No. 80-717

Supreme Court, U. S.
FILED
OCT 15 1980
SAMUEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1980

PAUL KISS,

Petitioner,

vs.

MONMOUTH COUNTY WELFARE BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

ABRAHAM R. KLITZMAN
KLITZMAN, KLITZMAN & GALLAGHER
Attorneys for Petitioner
19 Main Street
Asbury Park, New Jersey 07712
(201) 775-4400

4087 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

QUESTIONS PRESENTED

Whether a seven-year delay between the filing of a summons and complaint seeking a judgment of filiation and the ultimate trial on the issue constitutes a denial of due process of law.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	ii
Opinions Below	1
Jurisdiction	2
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting the Writ	3
Conclusion	4

TABLE OF CITATIONS

Cases Cited:

United States, Petitioner v. Jeffrey R. MacDonald, ___ F.2d ___ (4th Cir. 1980) 4

Statute Cited:

28 U.S.C.A. §1257(3) 2

United States Constitution Cited:

Fourteenth Amendment 2, 3

Contents

Page

APPENDIX

Appendix A — Opinion of the Supreme Court of New Jersey Filed July 23, 1980 ..... 1a

Appendix B — Opinion of the Superior Court of New Jersey Decided October 23, 1979 ..... 2a

Appendix C — Order Adjudging Paternity and Directing Payment of the Monmouth County Court Filed July 25, 1978 ..... 5a

Appendix D — Order of the Juvenile & Domestic Relations Court of the County of Monmouth Filed January 18, 1979 ..... 7a

No.

In The

Supreme Court of the United States

October Term, 1980

PAUL KISS,

Petitioner,

vs.

MONMOUTH COUNTY WELFARE BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Paul Kiss, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Jersey on July 23, 1980.

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey is unreported and is printed in Appendix A hereto, *infra,* page 1a. The opinion of the Appellate Division of the Superior Court of

New Jersey is unreported and is printed in Appendix B hereto, *infra,* page 2a. The order adjudging paternity and directing payment of the Monmouth County Court is unreported and is printed in Appendix C hereto, *infra,* page 5a. The order of the Juvenile & Domestic Relations Court of the County of Monmouth is unreported and is printed in Appendix D hereto, *infra,* page 7a.

JURISDICTION

The judgment of the Supreme Court of the State of New Jersey (Appendix A, *infra,* page 1a) was entered on July 23, 1980. The jurisdiction of the Court is invoked under 28 U.S.C.A. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On or about March 3, 1971 the petitioner, Paul Kiss, was served with a summons and complaint in the Juvenile & Domestic Relations Court of Monmouth County, New Jersey. The complaint sought a determination of whether the petitioner was the father of an illegitimate child born February 10, 1970 to Katherine Harris (Sajko). Blood tests were inconclusive. At the request of the Monmouth County Welfare Board by letter dated April 27, 1971, the case was adjourned. No further action was taken by the Monmouth County Welfare Board until November 22, 1977, on which date petitioner herein was notified that a

hearing was scheduled for December 5, 1977. A motion with supporting affidavits was made to dismiss the action on the basis of laches. Implicitly, the issue of procedural due process was raised at that juncture. The motion was denied on July 17, 1978. The matter came on for hearing before the Juvenile & Domestic Relations Court which determined that the petitioner herein was not the father of the illegitimate child born February 10, 1970.

The Monmouth County Welfare Board appealed the judgment to the Monmouth County Court. Trial de novo was had on July 14-17, 1978. The court ruled that the petitioner herein was the father of the illegitimate child born on February 10, 1970. The trial was more than seven years after service of the initial summons and complaint.

A notice of appeal was filed with the Appellate Division of the Superior Court of New Jersey on August 31, 1978. The Appellate Division affirmed the ruling of the lower court on October 23, 1979. A petition for certification was filed with the Supreme Court of the State of New Jersey. The petition for certification was denied.

Petitioner seeks a reversal of the finding of the Monmouth County Court and a complete dismissal of the complaint against him.

REASONS FOR GRANTING THE WRIT

The inexcusable delay of over six years from the service of the original summons and complaint to the first trial in the action presents a patent violation of the Fourteenth Amendment as to a putative father of an illegitimate child. A delay of such magnitude in bringing the matter on for trial worked unfairly to the disadvantage of the petitioner herein, who was precluded by the lapse of time from calling a witness who had died.

The principles set forth in the recent opinion of the Court of Appeals for the Fourth Circuit in the matter of *United States, Petitioner v. Jeffrey R. MacDonald,* should be applied to a filiation proceeding which is quasi-criminal in nature and which can impose upon the petitioner a severe and long-standing financial burden.

CONCLUSION

For the reasons hereinabove stated, we respectfully request that the petition for certiorari be granted.

Respectfully submitted,

Abraham R. Klitzman

KLITZMAN, KLITZMAN
& GALLAGHER
Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF NEW JERSEY FILED JULY 23, 1980

SUPREME COURT OF NEW JERSEY

C-942 SEPTEMBER TERM 1979

MONMOUTH COUNTY WELFARE BOARD,

Plaintiff-Respondent,

vs.

PAUL KISS,

Defendant-Petitioner.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-55-78 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 21st day of July, 1980.

s/ Stephen W. Townsend
Clerk

FILED
Supreme Court
Jul. 23, 1980

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY DECIDED OCTOBER 23, 1979

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-55-78

MONMOUTH COUNTY WELFARE BOARD,

Plaintiff-Respondent,

v.

PAUL KISS,

Defendant-Appellant.

Submitted: October 10, 1979-Decided: Oct. 23, 1979

Before Judges Crane and King.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County.

Barrett, Jacobowitz & Bass, attorneys for appellant (Peter B. Bass, On the Brief).

Raymond B. De Ridder, attorney for respondent (Michael D. Farren, On the Brief).

BY THE COURT

Defendant appeals from an adverse judgment of filiation by the law division judge in this paternity action and from an order

to pay child support of $123.50 per month. Defendant contends that: (1) the judgment of the law division was not supported by credible evidence, (2) the equitable defense of laches should have barred prosecution of the action, and (3) the order to pay should be reversed because it was not based on defendant's financial ability.

We have reviewed the testimony and are convinced that the finding of filiation is supported by sufficient credible evidence in the record. This testimony on the issue was conflicting and the trial judge was entitled to accept the evidence supporting the view that defendant was the father of the child. *Rova Farms Resort v. Investors Ins. Co.*, 65 *N.J.* 474 (1974).

This action was commenced in March 1971 at the behest of the County Welfare Board. Each side requested adjournments and as a result no further action took place until November 1977 when defendant was directed to report to the County Welfare Board for an interview. In February 1978 defendant moved, through counsel, to dismiss the complaint for failure to timely prosecute the claim. The law division judge did not rule on the motion to dismiss on the grounds of delayed prosecution until after the presentation of evidence was concluded in July 1978. The trial judge then found that neither the mother, Sajko, nor the defendant was anxious to have the matter heard while it was pending over seven years. The judge further concluded that the proposed testimony of an alleged witness, Johnson, whose appearance defendant contended was precluded unfairly because of the passage of time would not have affected the result even if it were available in light of the judge's view of the "overwhelming" evidence favoring the plaintiff. We conclude that there was sufficient evidence in the record, if believed, to support the trial judge's finding that the absence of substantial prejudice to the defendant precluded the application of the bar of laches.

Appendix B

Finally, defendant contends that the trial judge should have taken testimony concerning his "ability and financial condition to pay." We agree. Although this action was brought pursuant to *N.J.S.A.* 9:17-1, *et seq.*, rather than the preceeding chapter 16, the two chapters "are to be considered as intertwined enactments." *Leonard v. Leonard,* 21 *N.J.* 539, 543 (1956). We reverse the order for payment, as to amount only, and remand for a hearing on this issue.

The judgment of filiation is affirmed. The order to pay is reversed and remanded. Jurisdiction is not retained.

A TRUE COPY

s/ Elizabeth McLaughlin
Clerk

APPENDIX C — ORDER ADJUDGING PATERNITY AND DIRECTING PAYMENT OF THE MONMOUTH COUNTY COURT FILED JULY 25, 1978

MONMOUTH COUNTY COURT
LAW DIVISION

Raymond B. De Ridder, Esquire
Attorney for Plaintiff
East Freehold and Burlington Roads
Freehold, New Jersey 07728

MONMOUTH COUNTY WELFARE BOARD,
a corporate entity of the State
of New Jersey on behalf of
Katherine Sajko, MC-3,754,

Plaintiff

vs

Paul Kiss
231 Roosevelt Avenue
Oakhurst, New Jersey,

Defendant

This matter being opened to the Court by Michael D. Farren, Esquire, Attorney for the Plaintiff, by Appeal from the decision of the Honorable Burton L. Fundler in the Juvenile and Domestic Relations Court, dated May 18, 1978, Ronald D. Barrett, Esquire, appearing for the Defendant, and the proofs being taken and the Court having heard the testimony presented and having reviewed the exhibits herein and having returned a verdict in favor of the Plaintiff and against the Defendant,

It is on this 17th day of July, 1978

Appendix C

ORDERED AND ADJUDGED that Paul Kiss, the Defendant herein, is the father of Paul Harris, an infant born unto Katherine (Harris) Sajko on February 10, 1970 at the Monmouth Medical Center, Long Branch, New Jersey; and it is further

ORDERED THAT THE SAID Defendant pay to the Monmouth County Probation Department, who shall forward such payments directly to the Monmouth County Welfare Board, the sum of $123.50 each and every month while the said Paul Harris is receiving Assistance from that Board, and thereafter all payments should be directed to Katherine (Harris) Sajko until the aforementioned child reaches majority provided, however, that all payments due the Monmouth County Welfare Board have been paid.

s/ William T. Wichmann
William T. Wichmann,
Judge, County Court

APPENDIX D — ORDER OF THE JUVENILE & DOMESTIC RELATIONS COURT OF THE COUNTY OF MONMOUTH FILED JANUARY 18, 1979

JUVENILE AND DOMESTIC RELATIONS COURT OF THE COUNTY OF MONMOUTH

DOCKET NO. 5859-MCWB (71)

Civil Action

BARRETT, JACOBOWITZ AND BASS
208 Monmouth Road
Oakhurst, New Jersey 07755
(201) 531-3600
Attorneys for Defendant

MONMOUTH COUNTY WELFARE BOARD, a corporate entity of the State of New Jersey on behalf of Katherine Sajko,

Plaintiff,

vs.

PAUL KISS,

Defendant.

This matter coming on for trial before The Honorable Burton L. Fundler, on the Complaint and Summons issued by the plaintiff, Monmouth County Welfare Board, a corporate entity of the State of New Jersey, on behalf of Katherine Sajko, and the Court sitting without a jury having considered the testimony of the witnesses;

IT IS on this 16th day of January, 1979,

Appendix D

ORDERED that the plaintiff's application be and the same is hereby denied.

s/ Burton L. Fundler
BURTON L. FUNDLER, J.S.C.